

STATE OF MICHIGAN
COURT OF APPEALS

In re A. N. SMOLEN, Minor.

UNPUBLISHED

January 22, 2015

No. 322591

Wayne Circuit Court

Family Division

LC No. 13-515237-NA

Before: BECKERING, P.J., and JANSEN and BOONSTRA, JJ.

PER CURIAM.

Respondent father¹ appeals as of right from the trial court's order terminating his parental rights to the minor child under MCL 712A.19b(3)(b)(i), (g), (j), (k)(iii), and (k)(v). We affirm.

I. FACTUAL BACKGROUND

Respondent's daughter, AS, was removed from his care after he was arrested and charged in the death of his youngest daughter, six-week-old PS, who died from non-accidental physical trauma. Testimony indicated that PS was injured while in respondent's care. The child's mother testified that she was asleep when the injuries occurred, but when she awoke she observed swelling around the left side of the child's eye. Medical testimony and evidence indicated that the child received multiple catastrophic injuries that were attributable to non-accidental trauma. Respondent gave conflicting statements to police officers concerning what happened to PS and what caused her injuries. Eventually, he admitted to slapping PS in the head and stated that he accidentally dropped the child on her face. At the time of the protective proceedings, respondent had been charged with first-degree child abuse and felony murder.²

The family had a prior history with Child Protective Services (CPS) in Georgia. In that case, AS's pediatrician observed bruising on the child's buttock in the shape of a handprint at her

¹ The child's mother was also listed as a respondent; however, the trial court declined to terminate her parental rights. For purposes of this appeal, references to "respondent" refer solely to respondent father.

² We also note that petitioner's brief indicates that respondent subsequently pleaded guilty to second-degree murder related to PS's death and was sentenced to 28 to 60 years' imprisonment.

three-month check up. The case was substantiated for physical abuse and both parents were listed as perpetrators. No services were provided because the family moved to Michigan.

The trial court terminated respondent's parental rights at the initial dispositional hearing pursuant to MCL 712A.19b(3)(b)(i), (g), (j), (k)(iii), and (k)(v). The court also found that termination of respondent's parental rights was in the child's best interests.

II. STATUTORY GROUNDS FOR TERMINATION

Respondent argues that the trial court erred in finding that the statutory grounds for termination were established by clear and convincing evidence.

The petitioner has the burden of establishing a statutory ground for termination under MCL 712A.19b(3) by clear and convincing evidence.³ *In re Trejo Minors*, 462 Mich 341, 350; 612 NW2d 407 (2000). The trial court's factual findings as well as its ultimate determination that a statutory ground for termination has been proven are reviewed for clear error. *In re Mason*, 486 Mich 142, 152; 782 NW2d 747 (2010). A finding is clearly erroneous if, although there is evidence to support it, this Court is left with a definite and firm conviction that a mistake was made. *Id.* Regard is given to the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it. *In re Ellis*, 294 Mich App 30, 33; 817 NW2d 111 (2011).

The trial court terminated respondent's parental rights in part under MCL 712A.19b(3)(b)(i), (k)(iii), and (k)(v), which permit termination of parental rights under the following circumstances:

(b) The child or a sibling of the child has suffered physical injury or physical or sexual abuse under 1 or more of the following circumstances:

(i) The parent's act caused the physical injury or physical or sexual abuse and the court finds that there is a reasonable likelihood that the child will suffer from injury or abuse in the foreseeable future if placed in the parent's home.

* * *

(k) The parent abused the child or a sibling of the child and the abuse included 1 or more of the following:

* * *

³ Although we affirm the trial court's findings with respect to all of the statutory grounds in this matter, only one statutory ground need be proven in order to terminate parental rights. *In re HRC*, 286 Mich App 444, 461; 781 NW2d 105 (2009).

(iii) Battering, torture, or other severe physical abuse.

* * *

(v) Life-threatening injury.

Respondent argues that termination of his parental rights was not warranted under these subsections because the evidence failed to show that he purposely caused PS's injuries. He emphasizes that witnesses testified that he was a loving, caring father, who was never rough with his children. He further asserts that it is plausible that PS's injuries were caused by the child's mother. We reject respondent's arguments.

The trial court's finding that PS's fatal injuries were caused by non-accidental physical abuse perpetrated by respondent is supported by the medical evidence and testimony. PS was only six weeks old when she arrived at the hospital with life-threatening injuries. The medical examiner testified that the child's injuries and death were caused by "non-accidental trauma" to her head, brain, and liver. He reported that the child had "multiple injuries" to her cheek, lower and upper left eyelids, "at least five contusions" on her scalp, as well as a subdural hematoma, "bleeding into the arachnoid space into the brain," swelling of the brain, and a liver contusion. He further stated that the constellation of injuries indicated that the child had been hit more than once. He ruled the child's death a homicide. There was also ample evidence to support that respondent was responsible for causing the child's death. Respondent and the child's mother lived together and were PS's sole caregivers. The child's mother testified that she was asleep when the child was injured, meaning that respondent was alone with the child when she suffered numerous non-accidental injuries. Respondent gave inconsistent statements to police officers before admitting to slapping the child hard in the face and then dropping the child face-first on the floor. Although respondent later asserted to a CPS worker that his confession was coerced, the trial court was not required to credit that assertion. And, although respondent contends that he accidentally dropped the child, where the medical evidence did not support that the trauma inflicted upon the child was accidental, the trial court did not clearly err in finding that respondent, who was the only adult caring for the child at the time of her numerous injuries, was responsible for inflicting those injuries. Therefore, the trial court did not clearly err in finding that respondent abused AS's sibling and that the abuse included both severe physical abuse and life-threatening injury. Thus, termination was warranted under §§ 19b(3)(k)(iii) and (v). Furthermore, respondent had also recently been charged with physically assaulting a homeless man outside of his place of employment. In light of the evidence of respondent's assaultive history, which included causing the death of AS's sibling, the trial court did not clearly err in finding that there was a reasonable likelihood that AS would suffer injury if returned to respondent's home. Therefore, termination of respondent's parental rights pursuant to § 19b(3)(b)(i) was also proper.

The trial court also terminated respondent's parental rights pursuant to MCL 712A.19b(3)(g) and (j), which provide that parental rights may be terminated under the following circumstances:

(g) The parent, without regard to intent, fails to provide proper care or custody for the child and there is no reasonable expectation that the parent will be

able to provide proper care and custody within a reasonable time considering the child's age.

* * *

(j) There is a reasonable likelihood, based on the conduct or capacity of the child's parent, that the child will be harmed if he or she is returned to the home of the parent.

The evidence that respondent caused PS's non-accidental fatal injuries supports the trial court's finding that respondent failed to provide proper care or custody for his children. This same evidence, together with the evidence of respondent's substantiated physical abuse of AS in Georgia,⁴ supports the trial court's determination that there was no reasonable expectation that respondent would be able to provide proper care and custody within a reasonable time, and that there is a reasonable likelihood that AS would be harmed if returned to respondent's care. Thus, the trial court did not clearly err in finding that termination of respondent's parental rights was also proper under §§ 19b(3)(g) and (j).⁵

III. BEST INTERESTS

Respondent also argues that the trial court erred in finding that termination of his parental rights was in the child's best interests. "If the court finds that there are grounds for termination of parental rights and that termination of parental rights is in the child's best interests, the court shall order termination of parental rights and order that additional efforts for reunification of the child with the parent not be made." MCL 712A.19b(5). Whether termination is in the child's best interests is determined by a preponderance of the evidence. *In re Moss*, 301 Mich App 76, 90; 836 NW2d 182 (2013). In determining what is in a child's best interests, the trial court may

⁴ Although the Georgia CPS report listed both respondent and the child's mother as the perpetrators of the incident of abuse in Georgia and did not explicitly specify who was responsible, where AS suffered abuse in respondent's care, that abuse was sufficient for the trial court to conclude that respondent failed to provide proper care and custody and that there was a reasonable likelihood of harm if the child were returned to his care. See *In re VanDalen*, 293 Mich App 120, 139-140; 809 NW2d 412 (2011) (affirming the trial court's decision to terminate parental rights under MCL 712A.19b(3)(g) and (j) even though there was no evidence as to which respondent caused the children's injuries when the children were injured while in the respondents' care).

⁵ In passing, respondent argues that the trial court abused its discretion by declining to adjourn the protective proceedings pending the outcome of his criminal trial related to the death of PS so that he could testify on his own behalf. This Court rejected a similar argument in *In re Stricklin*, 148 Mich App 659, 664-666; 384 NW2d 833 (1986). Despite respondent's contentions on appeal, he could have testified in the protective proceedings had he chosen to do so, and he could not have been compelled to incriminate himself. See *id.* See also *In re MU*, 264 Mich App 270, 283 n 5; 690 NW2d 495 (2004).

consider a variety of factors, including the child's bond to the parent, the parent's parenting ability, the child's need for permanency, stability, and finality, and the advantages of a foster home over the parent's home, *In re Olive/Metts Minors*, 297 Mich App 35, 41-42; 823 NW2d 144 (2012), as well as a respondent's history, psychological evaluation, and parenting techniques. *In re Jones*, 286 Mich App 126, 131; 777 NW2d 728 (2009). A trial court's decision regarding a child's best interests is reviewed for clear error. *In re Trejo Minors*, 462 Mich at 356-357.

PS sustained severe, fatal injuries while living with respondent. The evidence indicated that PS was hit more than once and that she suffered fatal, non-accidental trauma while in respondent's care. As noted, there was no plausible explanation for PS's death other than physical abuse caused by respondent. Further, respondent admitted to slapping the six-week-old child hard in the face. Considering the past abuse toward AS, as substantiated by Georgia CPS, and the magnitude of respondent's abuse of PS, causing her death, the trial court did not clearly err in finding that termination of respondent's parental rights was in AS's best interests.

Respondent argues that termination of his parental rights was inappropriate in light of the child's placement with a maternal great-aunt. "[A] child's placement with relatives weighs against termination" and the fact that a child is living with a relative when the case proceeds to termination is a factor to be considered in determining whether termination is in the child's best interests. *In re Mason*, 486 Mich at 164. "A trial court's failure to explicitly address whether termination is appropriate in light of the children's placement with relatives renders the factual record inadequate to make a best interests determination and requires reversal." *In re Olive/Metts Minors*, 297 Mich App at 43. Contrary to what respondent asserts, the trial court considered AS's relative placement.⁶ The court stated:

The Court does note that the child is placed in relative placement with the maternal aunt. The Court considers the magnitude of the abuse on [PS] by [respondent], the evidence of physical abuse in the past to [AS] by [respondent], and the fact that [PS] is deceased due directly to physical abuse of her by the father, shows that the father presents a serious risk of harm to the physical health and mental well being of [AS], and this severely diminishes and extinguishes any value to the child maintaining a parent/child relationship with [respondent].

Thus, the trial court explicitly considered AS's relative placement, but found that it did not weigh against termination of respondent's parental rights in light of the magnitude and seriousness of respondent's conduct, which extinguished any value to maintaining a parent-child relationship. The trial court's finding is not clearly erroneous.

Respondent also argues that reversal is required because the trial court failed to identify the standard of proof that it applied in deciding the AS's best interests. Respondent contends that it is impossible to determine whether the court applied the proper preponderance of the

⁶ Respondent's claim that the trial court was required to address its findings regarding termination in light of relative placement in a written order lacks merit. MCR 3.977(I)(1).

evidence standard or a lower probable cause standard. A trial court errs when it bases a finding on a misconception of the law. *Price v City of Westland*, 451 Mich 329, 337; 547 NW2d 24 (1996). However, a court is presumed to know the law and that presumption must prevail absent clear evidence to the contrary. *People v Knapp*, 244 Mich App 361, 389; 624 NW2d 227 (2001). The trial court did not reference the preponderance of the evidence standard when addressing the child's best interests, but it was not required to do so. Although respondent asserts that it is impossible to determine whether the court may have improperly applied a lesser probable cause standard, the court at no point made any reference to that lower standard. Because a court is presumed to know the law and there is no basis for concluding that the court applied an incorrect standard, we reject this claim of error.

Affirmed.

/s/ Jane M. Beckering
/s/ Kathleen Jansen
/s/ Mark T. Boonstra